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No. 261.

# In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE GOAT & SHEEPSKIN IMPORT COMPANY,
PETITIONER,

*v.*

THE UNITED STATES.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

29933—07

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### STATEMENT OF THE CASE.

This case involves the dutiable classification of the fleece on the skins of certain Mocha sheep, imported from Hodeida, Arabia, which was classified by the collector as wool on the skin of the third class and assessed for duty at 3 cents per pound under the provisions of the tariff act of July 24, 1897.

The paragraphs of the act which are involved are as follows:

> 348. All wools, hair of the camel, goat, alpaca, and other like animals, shall be divided, for the purpose of fixing the duties to be

charged thereon, into the three following classes:

351. Class three, that is to say, Donskoi, native South American, Cordova, Valparaiso, native Smyrna, Russian camel's hair, and all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Syria, and elsewhere, excepting improved wools hereinafter provided for.

352. The standard samples of all wools which are now or may be hereafter deposited in the principal custom-houses of the United States, under the authority of the Secretary of the Treasury, shall be the standards for the classification of wools under this act, and the Secretary of the Treasury is authorized to renew these standards and to make such additions to them from time to time as may be required, and he shall cause to be deposited like standards in other custom-houses of the United States when they may be needed.

358. On wools of the third class and on camel's hair of the third class, the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound.

360. The duty on wools on the skin shall be one cent less per pound than is imposed in this schedule on other wools of the same class and condition, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe.

In returning this merchandise no duty was assessed on the skins themselves, and only those fleeces

were assessed which upon examination were found to contain a high enough percentage of wool to be considered dutiable, those which were short and contained a smaller percentage of wool being passed entirely free. (R., 11, 26.)

The importer protested the collector's decision, claiming generally that the merchandise was entitled to entry free of duty as raw sheepskins without the wool on, under paragraph 664 of the tariff act (R., 8), and in some protests perhaps claiming alternatively that it was entitled to free entry as unmanufactured animal hair, under paragraph 571.

The collector's decision classifying the merchandise as wool on the skin of the third class was sustained by the Board of General Appraisers, the Circuit Court, and the Circuit Court of Appeals, successively.

ARGUMENT.

As the fleece in question is not one of the classes of wool specifically enumerated in paragraph 351, its classification thereunder depends upon whether it is a wool "of like character" within the provisions of the tariff act.

The importer conceded, and in fact proved, that the skins in question were those of a species of the Arabian Mocha sheep, but rested its case solely upon the claim that the coat upon these sheepskins was not wool within the meaning of the tariff act.

In support of this claim it made no effort to show that the fleeces in question were not "of like character" to Donskoi and other enumerated wools of

the third class, or did not correspond to the standard samples of wool of the third class deposited in the customs-house—the record being silent on this point—nor that at the time the act of 1897 was passed there was any fixed commercial meaning of either the term "wools" or "wools of the third class" or "wools of like character" to Donskoi and other third class wools, but relied upon testimony relating, *so far as commercial usage prior to 1897 is concerned, solely to this particular merchandise*, and which is claimed on page 9 of the brief for appellant to establish:

> 1. That the substance (was) commercially known as hair and dealt in under that designation, and never as wool. * * *
> 2. It has none of the characteristics of wool.
> 3. It is not used as wool and is not suitable for the uses to which wool is put.

While it is true that if "Mocha wool" had been specifically enumerated in the tariff act as an article subject to duty, proof that the merchandise in question was not included in the commercial meaning of the term "Mocha wool" would have excluded it from classification as such, it is submitted in behalf of the Government that the testimony on which the importer relies in reference to the commercial designation, character, and uses of the fleece of this particular kind of sheep is irrelevant and immaterial, for the following reasons:

## I.

**Under the wool paragraphs of the tariff act the word "wool" is manifestly used in a generic sense to describe the fleece of the sheep, as distinguished from the word "hair," which is used to describe the coat of the camel and other like animals, and not in a technical and commercial sense as referring only to that portion of the fleece of the sheep which possesses the specific qualities of wool as distinguished from those of hair.**

In construing the wool schedule of the tariff act the following facts, of which the court will take judicial knowledge, are to be considered, namely: That all wool is, scientifically speaking, a form of hair; that while the coat of the sheep possesses in greatest degree the characteristic qualities of wool as distinct from those of hair, that that of many other animals, such as the alpaca, the Angora goat, and the camel, also possesses many of the technical qualities of wool, some of these other animals in larger degree than the lower grades of sheep; and that in the coat of all of these animals there is a variety of texture ranging from wool to hair, whose degree varies with the different kinds of animals and with their different species.

In Webster's International Dictionary the first definition of wool is: "The soft and curled or crisped species of hair which grows on sheep and some other animals, and which in fineness sometimes approaches fur." In the Century Dictionary it is defined as "the fine, soft, curly hair which

forms the fleece or fleecy coat of the sheep and some other animals, as the goat and alpaca, in fineness approaching fur;" and in the Standard Dictionary it is defined as "the soft and more or less long, curly, or crisped hair obtained from sheep and some allied animals, and used chiefly in the manufacture of clothing," and it is further stated that "in different animals wool shades by imperceptible degrees into hair, and that of the sheep simply represents an extreme case of the most desirable qualities, namely, fineness, kinkiness, and scaliness of the fiber, together with its length, strength, and luster, and the copiousness of the fleece, which consists entirely of wool, without hair; in all of which particulars the wool of the different breeds of sheep varies to a degree."

In the Encyclopædia Britannica (9th ed., vol. 24, p. 653), under the title of "Wool and woolen manufactures," it is said: "Wool is a modified form of hair, distinguished by its slender, soft, and wavy or curly structure, and by the highly imbricated or serrated surface of its filaments. The numerous varieties of the sheep are the most characteristic, as they are also by far the most important, producers of wool; but the sheep is by no means the only animal which yields wool employed for industrial purposes. The alpaca and other allied fibers obtained from the alpaca and its cogeners in South America, the mohair yielded by the Angora goat, and the soft, woolly hair of the camel are all wools of much industrial importance, while

the most costly wool in the world is that yielded by the Cashmere goat of the Himalayan Mountains. At what point indeed it can be said that an animal fiber ceases to be hair and becomes wool it is impossible to determine, because in every characteristic the one class by imperceptible gradations merges into the other, so that a continuous chain can be formed from the finest and softest merino to the rigid bristles of the wild boar."

In the work entitled "Wool and its applications," by Professor Archer, of the Edinburgh Museum of Science and Art, it is said: "Many of the mammalian animals have both wool and hair, but only in a very few is the wool in greater abundance than the hair proper. Chief of these is the sheep, next the Angora goat, then the llama, alpaca, vicuna, and the camel."

And in a report on the "Classification of wool," submitted to the Secretary of the Treasury by G. W. Bond, who prepared the cabinet of standard samples, and which was published in 1900 (Treas. Dec. No. 22681), in the general classification of sheep which he adopts, dividing them into ten distinct, original races, various of these species are specified as having hair, as, for example, the Shetland, "with fine, long hair;" the Zackel sheep, "all hairy," and the long-legged sheep, "most of them very hairy." (3 Treas. Dec., p. 1040.)

Bearing in mind, therefore, that no hard and

fast line can be drawn between sheep on the one hand and alpacas and other like animals on the other, in the matter of whether their coat is specifically wool or hair, it will be seen that Congress, in the wool paragraphs of the tariff act, did not attempt to classify the coats of these animals with reference to whether they consisted technically of wool or hair, and did not use these words as commercial designations or trade terms, but used the word "wool" broadly as describing the coat of the sheep, the most important and characteristic of the wool-bearing animals, and the term "hair" broadly as describing the coat of the alpaca and like animals.

The essential provisions of the statute are as follows:

By paragraph 348 it was provided that "*all* wools, hair of the camel, goat, alpaca, and other like animals" should be divided, for the purpose of fixing duties, into three classes; by paragraph 349, that class one should consist of wools of merino blood, down clothing wools, and other wools of like character, and all wools not included in classes two and three; by paragraph 350, that class one should consist of Leicester and other like combing wools of English blood and "hair of the camel, angora goat, alpaca, and other like animals;" and by paragraph 351, that class three should consist of Donskoi and other wools of like character and Russian camel's hair.

It was certainly intended by those provisions

that *all* wools and *all* hair of the camel, Angora goat, alpaca, and other like animals should be assessed for duty under one of these three classes; and it seems equally clear from the face of the statute that the term "wools" was used in its generic sense as equivalent to the coat of the sheep, just as the term "hair" was used in its generic sense as equivalent to the coat of the camel, alpaca, and other like animals; and that *Congress intended that the coat of all breeds of the sheep and of the camel, alpaca, and similar animal, which were deemed of sufficient commercial importance to be imported into this country, should be assessed for duty, and should be classified for that purpose, under one of the three classes mentioned*, by their race and blood, according to the breeds especially enumerated and their similitudes, and as determined by the standard samples deposited in the custom-house, and not with reference to whether their coat was technically or commercially to be regarded as "wool" or as "hair," and that it was no more intended that the fleece of any sheep should escape duty under one of these three classes because it might have the technical quality of hair and be commercially known as such, than it was that the hair of any camel, Angora goat, alpaca, or other like animal should escape duty because it might have the technical quality of wool and be known as such commercially.

That this was the sense in which the words "wool" and "hair" were used in the tariff act is

plainly shown by the subsequent paragraphs, as follows:

In paragraph 355 it is provided that "unwashed wools should be considered such as shall have been *shorn from the sheep* without any cleansing," and washed wools such as have been "washed with water only on *the sheep's back* or on the skin," etc.

In paragraph 356 it is provided that "the duty upon *wool of the sheep* or hair of the camel, Angora goat, alpaca, or other like animals, of class one and class two, which shall be imported in any other than ordinary condition, or which has been sorted or increased in value by the rejection of any part of the original fleece, shall be twice the duty to which it would be other subject;" and that "the duty upon the *wool of the sheep* or hair of the camel, Angora goat, alpaca, or other like animals of any class which shall be changed in its character or condition for the purpose of evading duty," etc., shall be twice the duty to which it would be otherwise subject.

And again in paragraph 664 of the free list there is excepted from duty raw skins of all kinds, "except *sheepskins with the wool on.*"

On referring to earlier tariff statutes, it will be found that this generic use of the terms wool and hair began as far back as the tariff act of March 2, 1861 (12 Stat., c. 68), in which it was provided, in the first clause of section 12, that "any wool of the sheep, or hair of the alpaca, goat, and other

like animals, which shall be imported in any other than the ordinary condition," etc., shall be subject to an increased duty, and a duty was also placed upon "sheepskins, raw or unmanufactured, imported with the wool on."

This reference to "wool of the sheep" and "hair of the alpaca" and other animals was repeated in section 4 of the tariff act of June 30, 1864 (13 Stat., c. 171); in section 1 of the act of March 2, 1867 (14 Stat., c. 197); in the act of March 3, 1883 (22 Stat., c. 121), and in paragraph 383 of the tariff act of October 1, 1890 (26 Stat., c. 1244).

Taking, therefore, all these various provisions from the tariff act of 1861 down to and including the act of 1897, it will be seen that the word "wool" was consistently and continuously used as describing the coat of the sheep, while the word "hair" was continuously and consistently used as describing the coat of the camel, alpaca, and other similar animals.

*It is further evident that under the tariff act the classification of wools is by race and blood, rather than by the specific characteristics of the wool.*

Thus, as shown by the report of G. W. Bond on the "classification of wools," which is cited above, in establishing the cabinet of standard samples the principle was recognized that the division made by the act "was by race or blood, and that no other practicable division could be made—the lines of

quality so subtilely run into one another, wools for all three uses, viz, clothing, combing, and carpet, being frequently found in the same flock, and even in the same fleece," . . . (3 Treas. Dec., p. 1038.)

And in Treas. Dec. No. 21737 it was said by the Board of General Appraisers:

> We may add that in establishing the standard samples of wool deposited in the principal custom-houses of the United States, under the authority of the Secretary of the Treasury, as authorized by paragraph 353 of the tariff act of 1897, and analogous paragraphs of previous acts, the principle of classification recognized is rather that of race and blood only, and not of use or adaptability, many wools of the first class being suitable only for carpets, and others are placed in the third class, from which a fair article of clothing could be made. (Wool and Wool Manufacturers, 1894, Ford, p. 269.)

*The practice of the Treasury Department and the following decisions of the Board of General Appraisers and of the courts show, more or less directly, that the words "wool" and "hair" are used in the tariff acts in a racial sense, and that the product of the animals to which they refer are not to be taken out of their racial classification by proof of their technical quality, or nonadaptability to specific uses or commercial designation.*

As early as 1880 it was ruled by the Secretary of the Treasury, in Treas. Dec. No. 4684, that Cashmere goat's hair could not be classified as wool of the third class or carpet wool, but was to be classified under the paragraph including "all hair of the alpaca, goat, and other like animals."

In *Lyon* v. *Marine* (55 Fed., 964 (C. C. A.)), decided in 1893, it was held that the fleece of an unimproved breed of the North Carolina sheep should be classified as "wool of the third class," under the act of 1890 (the classification under that act being practically identical with that under the act of 1897), although it contained a considerable admixture of hair. The court said:

> The writers on sheep * * * treat the hair which grows upon the bodies of unimproved sheep as the principal object to be removed by crosses with improved breeds. The native sheep of the United States, the native sheep of all countries, produce fleeces whose value is depreciated more or less by the undue quantity of hair contained in them * * *. One of the aims in improving native sheep by judicious crossing is to reduce the percentage of this deleterious product. The native sheep of the United States and of all countries named in paragraph 378 * * * have a moderate percentage of hair in their fleeces. This is common knowledge, taught by all textbooks on sheep and within the judicial cognizance of the courts * * *.

The policy of Congress was as simple as

> obvious. The finest grades of wool of short fiber, represented by the fleeces of the merino sheep and the sheep bred originally on the several downs of England, * * * are taxed 11 cents a pound. Wools of long fiber, from improved Cotswolds and like highly bred sheep, and the fine hairs of camels, alpacas, and goats of high breed, most of them exceeding in value the fine wools of the merino class, are subjected to the higher duty of 12 cents. Finally, wools and hairs from the sheep, described in paragraph 378, all more or less inferior in value to those of classes 1 and 2, * * * are subjected to an ad valorem duty equal to one-third their market value, whatever that may be.

In *Cooper* v. *Dobson* (157 U. S., 148), decided in 1894, arising under the tariff act of 1883, under which the classification of wools and hair was, broadly speaking, the same as that of the act of 1897, except that class one was entitled as "clothing wools," class two as "combing wools," and three as "carpet wools and other similar wools," it was held that common goat hair was properly classified under class two, even although it was proven to be unfit for combing purposes, and was similar in its adaptibility and uses to the hair of horses and cattle, and that it was not to be classified under the clause relating to "hair not specially provided for." The court held, Mr. Justice Shiras delivering the opinion, that the act—

> "all hair of the alpaca, goat, and other like animals" is subjected to a uniform duty of ten cents a pound, to whatever uses or purposes it is or may be adapted."

*The opinion expressed in United States* v. *Klumpp* (169 U. S., 206) *is, however, conclusive in its effect upon this point.* In this case, while it was held that the phrase "manufactures of wool," as used in the tariff act of 1894 in reference to a reduction of duties, included worsted dress goods made of wool, it was said that this phrase would not, however, include articles made of the hair of the camel and other animals, for the reason that while sheep's wool was a form of hair and while the Angora goat and other similar animals yielded a form of wool, nevertheless in the tariff act of 1890 and preceding years the wool of the sheep was distinguished from the hair of the camel and other like animals. Mr. Chief Justice Fuller, delivering the opinion of the court, said:

> Doubtless wool considered as the sheep's coat might be said to be the sheep's hair, and fleeces of the hair of the Angora goat, the llama, the alpaca, and other like animals, might be called their wool (p. 216).

And after setting forth the quotation from the Encyclopedia Britannica, which appears hereinabove, the opinion continues:

> But the acts of 1890 and 1894, as well as prior tariff acts, distinguished the wool of

> the sheep from the hair of the camel, goat, and other like animals as raw materials (p. 217).

As the paragraphs of the tariff act of 1897 relating to the classification of wools are identical, so far as this question is concerned, with the corresponding paragraphs in the act of 1890 and earlier statutes, it follows, logically, as a result of this opinion, that the words wool and hair are to be regarded in the act of 1897, as well as in the prior act, as used in a racial and generic sense, the term wool including the coat of the sheep, as distinguished from the term hair, including the coat of the camel, goat, and similar animals.

In Treas. Dec. No. 23179 (1901) it was held by the Board of General Appraisers that the growth of the Cashmere goat, *although claimed to be commercially known as "China brown cashmere wool,"* was nevertheless dutiable under class 2 "as hair of the camel, angora goat, alpaca, and other like animals." The Board said:

> "The testimony taken at the hearing . . . establishes the fact that the wool or hair of the Cashmere goat has heretofore, in customs practice, always been classified under analogous paragraphs of previous tariff acts, and that the article in question is identical in quality and character with the Government standard sample numbered 213, which was established under the authority of the Treasury Department, pursuant to the

power vested in the Secretary of the Treasury by paragraph 352 of the tariff act of 1897."

And in Treas. Dec. No. 26606 (1905) it was held by the Board of General Appraisers that wool imported from New Zealand which was shown by the evidence to be the fleece of the Leicester sheep and of English blood was properly classified as class 2 Leicester wool, although "known as New Zealand wool," and although some of the fleeces were shown to be of inferior quality.

## II.

**The rule of commercial designation is not applicable to the classification of wool.**

*1. It is well settled that where it appears from the statute itself that words in a tariff act are not used in a technical sense as a commercial designation or trade term, their meaning is not to be controlled by their commercial usage.*

*Maillard* v. *Lawrence*, 16 How., 250;
*Greenleaf* v. *Goodrich*, 101 U. S., 278;
*Barber* v. *Schell*, 107 U. S., 617;
*Newman* v. *Arthur*, 109 U. S., 132;
*Reimer* v. *Schell*, 4 Blatchf., 328;
*Roosevelt* v. *Maxwell*, 3 Blatchf., 391;
*Carson* v. *Nixon*, 90 Fed., 409;
*Patton* v. *United States*, 159 U. S., 500;
*Cadwalader* v. *Zeh*, 151 U. S., 171;
*United States* v. *Klumpp*, 169 U. S., 209.

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In *Maillard* v. *Lawrence* (16 How., 250) it was held that certain worsted shawls were properly classified as "wearing apparel" and not as "manufactures of worsted," even if they were commercially known as "manufactures of worsted" and were not commercially known as "wearing apparel," on the ground that obviously Congress must be understood to have intended to include "every article which in its design and completion and received uses is an article of wearing apparel," and that the phrase "wearing apparel" being "familiar to all classes, grades, and occupations," and not novel or obscure, as a term of art, a commercial signification was not to be substituted for its established and popular meaning.

In *Greenleaf* v. *Goodrich* (101 U. S., 278, 284), in which it was held that the phrase "goods of similar description" was not a commercial term, Mr. Justice Strong, in delivering the opinion of the court, referred to *Maillard* v. *Lawrence*, *supra*, as "an instructive case," and said that it was "rested on the basis that 'wearing apparel' was not a technical term."

In *Cadwalader* v. *Zeh* (151 U. S., 171, 176) Mr. Justice Gray, in delivering the opinion of the court, again referring to *Maillard* v. *Lawrence*, stated that it was because of the peculiar language of the act of 1846, making the designed object and actual use the sole test, that the court had affirmed the judgment of the Circuit Court, and said: "In the Circuit Court Mr. Justice Nelson said that 'this phraseology, for the purpose of describing a dutiable article, was used for the first time in the act of 1846, and was

*introduced for the purpose of describing a class of articles, not as known in trade and commerce, by any particular appellation, but by the actual use for which they were designed and to which they were adapted,'* * * * and that 'Congress intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article.'"

And again, in stating in this opinion the settled rule of interpretation that the commercial meaning of words used in the tariff acts is to prevail, Mr. Justice Gray added (p. 176) the express proviso, "*unless Congress has clearly manifested a contrary intention.*"

Considering, therefore, the case of *Maillard* v. *Lawrence* in the light of the subsequent references in *Greenleaf* v. *Goodrich* and *Cadwalader* v. *Zeh*, the rule would seem to be fairly deducible therefrom, which is entirely consistent with later decisions, that as it was evident from the statute itself that the words "wearing apparel" were not used in a technical or trade sense, but rather in a general sense, as including all articles intended for wearing, its meaning was not to be controlled by technical commercial usage.

In *Barber* v. *Schell* (107 U. S., 617) it was held in reference to a provision imposing a duty on "cotton laces, cotton insertings" and "manufactures composed wholly of cotton," that the principle of *Arthur* v. *Lahey* (96 U. S., 112) and kindred cases,

that the specific designation by a commercial name will prevail over a general term in a later act, had no application. Mr. Justice Blatchford, delivering the opinion, said:

> The designations qualified by the word "cotton" in the act of 1846 are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade. They are designations of quality and material. * * * This was the view applied by Mr. Justice Nelson in *Reimer* v. *Schell* (4 Blatchf., 328), in 1859, to colored cotton hosiery, under the provisions in question, and we think it a sound one. * * * *There is no question of commercial designation.*

In *Reimer* v. *Schell* (4 Blatchf., 328; Fed. Cas., No. 11676), referred to in the foregoing opinion, Nelson, circuit justice, said:

> The legislature designates the articles by special description, as contradistinguished from a designation by a commercial name; and the proper inquiry is as to their qualities and characteristics, with a view to ascertain if they come within the description. If they do, no argument can take them out of the rate of duty which has been imposed.

In *United States* v. *Klumpp* (169 U. S., 209, 216) it was held that as a provision imposing a duty on dress goods made of wool, worsted, or the hair of certain animals was a description addressed to the quality and material of the goods, the principle "that the

special designation of an article by its commercial meaning should prevail over general terms used in the same or a later act has no application."

In *Newman* v. *Arthur* (109 U. S., 132) it was held that certain cotton goods were to be classified as "manufactures of cotton" described by the number of "threads to the square inch," even although the threads in these goods were not counted in ordinary mercantile transactions and could not be counted by methods practiced by the trade, and that the rule of construing the statute in accordance with commercial use had no application because the language used was "unequivocal." Mr. Justice Matthews, delivering the opinion of the court, said:

> There is no reference in the statute, either expressly or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of any extrinsic circumstances. The rejected proof of the custom of merchants to rate certain descriptions of goods, as to values, by the number of threads to the square inch, as ascertained by inspection by means of a glass, throws no light whatever on the meaning of the law, because the law fixes the rate of duty by a classification based on the number of the threads in a square inch, without reference to the mode in which the count is to be made.

In *Patton* v. *United States* (159 U. S., 500), involving certain tops of scoured, unwashed wool, which had been broken up for the purpose of being imported as "woolen waste," but had been classified

by the collector as "scoured" wool of the first class, it was held that evidence of a commercial designation of the article as "woolen waste" was immaterial. Mr. Justice Brown, delivering the opinion, said:

> There is abundance of testimony to the effect that the article imported was not known commercially as "scoured wool;" but in the view taken by the court below, which we think was correct, this was immaterial. The act does not impose a duty upon scoured wool as such by its commercial designation, but provides that "the duty on wools * * * of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed." In short, the act refers not to the commercial designation but to the fact whether the wool has been actually scoured or washed or is imported unwashed. If the wools have in fact undergone the process of scouring, they are properly classified as imported scoured, although they may not be known commercially as scoured wools.

*It is never competent to control the meaning of a phrase used in the tariff act by proof of commercial usage when either the act itself or previous tariff legislation shows that it was intended to be used in a different sense.*

In *De Forest* v. *Lawrence* (13 How., 273, 281), it was held that sheepskins with the wool on them, which had been classified under various tariff acts as wool on the skin but were not enumerated under the act

of 1846, were not to be classified under that act as "raw skins of all kinds," although this was their commercial designation. Mr. Justice Nelson, speaking for the court, said:

> The article has never been classed in any of the tariff acts under the designation of skins; but has been charged always, since it came under the notice of these acts, with a specific duty. * * * And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, * * * yet, having a known designation in the revenue acts, * * * we must regard the article in the light in which it is viewed by these acts rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not.

In *Roosevelt* v. *Maxwell* (3 Blatchf., 391), it was held that as an analysis of the tariff act of 1846 showed that window glass was intended to be included in the term "wares of glass," it should be thus classified, even although it was not included in the commercial meaning of this term. The court said:

> The commercial understanding of the term might be adopted if it did not appear, by

> the act itself, that a different meaning was intended by the lawmakers. And if it does appear, by the act itself, that a particular meaning was intended by the terms used, then that particular meaning should be adopted in giving a construction to the act, whatever the commercial meaning of the terms may have been. * * * It appears * * * by the provisions of the act, particularly when it is examined in connection with the act of 1842, that Congress intended to include within these general terms all kinds of window glass. Such being the intent of the framers of the law, as discovered from the law itself, that intent must prevail over any meaning of those terms as understood by commercial men, even if it had been proved that the latter meaning was in conflict with the former.

While it is true that many of the foregoing cases do not involve a state of facts identical with the present case, it is nevertheless true that the general principle which runs through all of them is that whenever it appears from an inspection of the tariff laws themselves that certain words in a tariff law, whether by reason of their non-technical character or their reference to quality or material, or from other provisions of the same or former laws, were not intended by Congress to be used as trade names in the commercial designation of articles, the rule of interpretation by commercial usage has no application; and hence, if the underlying proposition contended for by the Government be correct, namely, that it appears from the tariff act

itself that the term wool was not used as a trade name, but as descriptive of the coat of the sheep, it follows, under the principle of the foregoing cases, that the coat of a particular species of sheep is not to be excluded from classification as wool merely because it may not have been included within the trade meaning of that word.

*2. General words of similitude, such as "goods of a similar description," are not words of commercial designation whose meaning can be controlled by proof that goods which are in fact of similar description have a different commercial classification.*

In *Greenleaf* v. *Goodrich* (101 U. S., 278) it was held that certain dress goods were classified under a provision imposing a duty on certain woolen delaines and "goods of similar description" and that the importer was not entitled to an instruction to the jury that the goods were not to be so classified unless they possessed all characteristics which "were commonly understood among merchants as distinguishing goods known in commerce as of a similar description with delaines." Mr. Justice Strong, delivering the opinion, said:

> Reliance is placed upon the rule * * * that the commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws. *But the present is not a case of commercial designation of articles. The phrase "of similar description" is not a commercial term,* and if

> it were, there is no evidence in the record to show what it is understood to mean among merchants and importers. In *Maillard* v. *Lawrence* (16 How., 251) we have an instructive case bearing upon this subject * * *. The case was rested on the basis that "wearing apparel" was not a technical term. Much less is the phrase, goods "of a similar description."

In *Schmieder* v. *Barney* (113 U. S., 645, 647, 648) it was held, following *Greenleaf* v. *Goodrich*, that certain Saxony dress goods were properly classified as "goods of similar description to delaines" within the tariff act of 1862, and that evidence that such goods were not commercially known as goods of similar description to delaines, but commercially belonged to the class of woven dress goods, was properly excluded by the trial court. Mr. Chief Justice Waite, referring to *Greenleaf* v. *Goodrich*, said that in that case—

> the real point for decision was whether goods must be commercially classified with delaines to make them of "similar description." It was there decided that if they were similar in product, in adaptation to uses, and in uses, they were of similar description, even though in commerce they might be classed as different articles. Upon that question the decision in *Greenleaf* v. *Goodrich* must be taken as conclusive.

So, in the case at bar, it is submitted that the controlling phrase, "wools of like character" to Donskoi and other wools of the third class, is not a commercial

designation of articles whose meaning can be controlled by proof that mocha fleeces have a different commercial classification.

*3. The proof of commercial designation in the present case is in any event insufficient, for the reason that where an importer claims that certain specific articles are excluded by their commercial designation from a class mentioned in a tariff act, it is not sufficient for such purpose, even in those cases where the test of commercial designation is applicable, to show negatively that these specific articles were commercially known by another name and were not commercially known by the name used in the act, but it must be affirmatively proven that the words used in the act had at the time of its passage a definite and uniform meaning which excluded the specific articles in question. In other words, the proof of commercial meaning must not be addressed simply to the commercial designation of the particular article in question, as was done in the case at bar, but to the commercial meaning of the term used in the act.*

*Greenleaf* v. *Goodrich*, 101 U. S., 278.
*Schmieder* v. *Barney*, 113 U. S., 645.
*Claflin* v. *Robertson*, 38 Fed., 92.
*Carson* v. *Nixon*, 90 Fed., 409 (C. C. A.).
*Field* v. *United States*, 90 Fed., 412 (C. C. A.).

The rule laid down in these cases is based upon the logical principle that the object of resorting to commercial designation is simply to determine *the*

*meaning of the words used by Congress*, and that when Congress has used given words in a statute they are held to include all articles coming within their ordinary meaning, unless it is shown that at the time the act was passed the words used by Congress, which are the only words whose interpretation is involved, had acquired in commercial usage a defined and limited meaning which excluded certain specific articles from classification thereunder.

In *Greenleaf* v. *Goodrich* (101 U. S., 278), in which it was held that the importer was not entitled to have the jury instructed that certain dress goods should not be classified as "goods of a similar description" to delaines unless they possessed all the characteristics which "were commonly understood among merchants as distinguishing goods known in commerce as of a similar description with delaines," the court, in addition to holding that the phrase "goods of a similar description" to delaines was not a technical term whose meaning could be shown by commercial use, further said:

> The record exhibits nothing tending to show what was commonly understood among merchants as distinguishing goods known in commerce as of a similar description with delaines from all other goods. Nor was there any evidence that there were any goods known by merchants or in commerce as goods of a similar description with delaines * * *.

In *Schmieder* v. *Barney* (113 U. S., 645, 648), likewise involving the classification of dress goods under the phrase "goods of similar description" to delaines, the importer contended that he had gone further in his proof than was done in the Greenleaf case and had offered to prove that in commerce these dress goods were not considered as of similar description to delaines, and argued that he had hence brought his case within the exception supposed to have been reserved in the Greenleaf case in the language above quoted. Mr. Chief Justice Waite, delivering the opinion, said:

> *The most that can be claimed for the alleged reservation in Greenleaf* v. *Goodrich* is *that it would have been proper to inquire whether the phrase "of similar description" was a commercial term, and, if so, what it was understood by merchants and importers to mean. That, however, is not what was attempted in this case.* The witnesses were asked, in effect, not what the words "of similar description" were understood among commercial men to mean, but whether the goods of these importers were known in commerce as goods of similar description to delaines.

In *Claflin* v. *Robertson*, 38 Fed., 92, 93, the importer, in order to show that by the rule of commercial usage certain imported fabrics woven out of cotton thread were not to be classified as "cotton laces" under the act of 1883, relied on testimony that these fabrics were known in commerce only by

the name of mosquito net, hamburg net, and the like, and "were never bought, sold, or spoken of in commerce as cotton laces." However, Lacombe, J., charging the jury, said:

> You will, of course, understand that *the plaintiff has to cover with his trade evidence both description of words—the words under which they are actually bought and sold and also the word or words under which he claims that they are not known.* To illustrate: "Linen" in the dictionary is described as a "thread or cloth made of flax or hemp." Now, from linen cloth are made hemstitch pocket handkerchiefs. Testimony merely to the effect that these handkerchiefs were never bought and sold in the trade by any other name than "hemstitch pocket handkerchiefs," and that they were never known in the trade as "linen," would not take these goods out of the class of linens, unless it was also shown that the word "linen" had been distorted from its actual meaning, and was by the trade used solely in a restricted sense, as covering only goods other than handkerchiefs. So, in the case before us, in order to take this class of goods, which * * * is within the dictionary meaning of the words "cotton laces," out of that class, the plaintiff must satisfy you by a fair preponderance of proof that at the time this act was passed * * * and prior thereto the words "cotton laces" had in the trade and commerce of this country * * * a peculiar or technical trade meaning and that such technical trade meaning excluded these articles.

In *Carson* v. *Nixon*, 90 Fed., 409 (C. C. A.), it was held that embroidered handkerchiefs which were hemstitched, scalloped, or initialed were not excluded from classification as embroidered handkerchiefs simply by proof that they were not known in the trade as "embroidered handkerchiefs," in the absence of proof that the term "embroidered handkerchiefs" was a recognized commercial designation which did not include the special kinds of embroidered handkerchiefs in question. The court adopted on this point the opinion of the Board of General Appraisers, as follows (p. 412):

> The term "embroidered handkerchiefs" (par. 276) is descriptive and not a commercial or trade designation. It is therefore immaterial whether the handkerchiefs in question are or are not known commercially as "embroidered and hemstitched handkerchiefs," or "embroidered and scalloped handkerchiefs."

To the same effect is *Field* v. *U. S.*, 90 Fed., 412 (C. C. A.), decided by the same court, in which it was held that the evidence made it clear that the word "embroideries" as applied to handkerchiefs had no special significance as a trade name, and must therefore have been used by Congress in its ordinary descriptive sense.

The proper method of showing that an article is excluded by commercial usage from classification under a given phrase of the tariff act is shown in the case of *Erhardt* v. *Ballin*, 55 Fed., 968 (C. C. A.),

in which, the issue being whether certain mufflers were to be classified as "hemmed handkerchiefs" according to the commercial understanding of that term prevailing at the time of the passage of the tariff act, "the plaintiffs gave testimony to show that they were not, but that they were always bought and sold as 'mufflers,' and that they were used for neckwear only, and that in commercial signification the term 'handkerchief' did not include articles other than those designed for use in wiping the face or hands."

Applying the foregoing authorities to the case at bar, it follows that as the importer limited his proof to testimony that these particular fleeces were known as Mocha hair and were not known as wool, and made no effort whatever to show that either the term "wools" or the term "wools of the third class" or the term "wools of like character" to Donskoi and other wools of the third class had, at the time the act was passed, a definite commercial meaning which excluded the particular fleeces in question, the proof on the question of commercial designation is therefore wholly insufficient, even if this were a case where the rule of commercial designation could apply.

III.

**The importer having made no effort to show either that the fleeces in question were not "of like character" to Donskoi or other enumerated wools of the third class, or that they did not conform to the standard samples of wool of the third class deposited in the custom-house,**

**the presumption must now prevail that the importation was of like character to the enumerated wools of the third class and was correctly classified by the collector as wool of the third class in conformity to the standard samples.**

It is well settled that the burden is upon the importer of overcoming by affirmative proof the presumption that the collector's decision was correct.

*Arthur* v. *Unkart*, 96 U. S., 118.
*Erhardt* v. *Schroeder*, 155 U. S., 124.
*Pickhardt* v. *United States*, 67 Fed., 323 (C. C. A.).
*United States* v. *Rosenwald*, 67 Fed., 323 (C. C. A.).
*United States* v. *Schering*, 123 Fed., 65 (C. C. A.).
*Nereshe~~imer~~imer* v. *United States*, 131 Fed., 977.

In *United States* v. *Rosenwald* (67 Fed., 323, 328 (C. C. A.)), Wallace, circuit judge, delivering the opinion, said:

~~*Robertson v. Downing*, 127 U. S., 607.~~
~~*United States v. Healy*, 160 U. S., 136.~~
~~*United States v. Fath*, 204 U. S., 143.~~

Whenever it is alleged by the importer that the collector has exacted a duty based upon an improper classification of merchandise, the burden of proof is upon him to prove the allegation. *Where the classification of merchandise depends upon the existence of specified characteristics descriptive of its qualities, it is to be presumed, in favor of a correct classi-*

*fication, that those characteristics were found by the officers of the customs.*

This rule was quoted and applied in *United States* v. *Schering* (123 Fed., 65, 66 (C. C. A.)), involving the question whether chloral hydrate had been properly assessed by the collector as "medicinal preparations containing alcohol," in which the court said:

> Although it does not specifically appear whether alcohol was used in the preparation of the importation in question, the fact that it was so used must be assumed. In the absence of evidence to the contrary, the presumption of the correctness of the action of the collector is to prevail.

Hence, under the foregoing authorities, as the proper classification of these fleeces depended upon their likeness to the enumerated wools of the third class, as determined by the standard samples, in the absence of countervailing proof, it must now be presumed, in favor of a correct classification, that such likeness was found by the customs officers, and the presumption of the correctness of the action of the collector will prevail.

## IV.

**The testimony offered by the importer in reference to the general character of these fleeces and their commercial use is insufficient to overthrow the presumption in favor of a correct classification.**

*1. As the test of classification under the statute is likeness of character to Donskoi and other enumerated*

*wools of the third class, to be determined by the standard samples of wool of the third class deposited in the custom-house, the importer's testimony as to the qualities of this fleece and its commercial use, which is entirely of an abstract and general character and not directed either to the point of its likeness to Donskoi and other enumerated wools or of conformity to the standard samples, is in any event immaterial.*

In *Merritt* v. *Welsh*, 104 U. S., 694, it was held that as under the act of 1875 the dutiable quality of sugars was graded by their color, according to the Dutch standard (which was required to be furnished to the collectors of the port by the Secretary of the Treasury), color standard was thereby made the sole test of classification, and it was immaterial that a process of manufacture had been used so as to degrade their color according to the chemical standard.

*2. It is well settled that where a wool or hair is of a species coming within a particular class of the wool schedule its especial quality and commercial use is immaterial and will not take it out of such class.*

*Cooper* v. *Dobson*, 157 U. S., 148.

In *Cooper* v. *Dobson* (157 U. S., 148) it was held that common goat hair which could not be used for combing purposes was properly assessed under the paragraph of the wool schedule in act of 1883 relating to wool and hair of the second class

(which differed from the corresponding paragraph of the act of 1897 mainly in having the heading "combing wool") and was not entitled to free entry under the paragraph relating to the hair of horses and other animals. The court held, Mr. Justice Shiras delivering the opinion, that the paragraph of the wool schedule contained no restriction that the hair referred to should be fit for combing, but that all hair of the goat and other like animals was subject to duty thereunder "for whatever uses or purposes it is or may be adapted."

Later, it was held by the Board of General Appraisers in Treas. Dec. No. 26606, July 20, 1905, that fleeces imported from New Zealand which were from Leicester sheep of pure English blood were properly classified as class 2 Leicester wool, under the act of 1897, although some of the fleeces where shown to be of inferior quality.

3. The claim that these fleeces are of such low value that the wool is not worth the duty, is immaterial, since, in the first place, its competition is equally or more disastrous to the American wool which was intended to be protected, and, secondly, if so valueless, the simple and natural procedure for the importers is to remove the fleece before its importation and thereby bring in the skin free under paragraph 664, without paying either freight or duty on the wool.

4. *There was, furthermore, material evidence tending to show that the fleece in question in fact has the*

*qualities and is adapted to the uses of a low-grade third-class wool, and hence, under the settled rule of practice, the concurrent finding of the Board of General Appraisers, the Circuit Court, and the Circuit Court of Appeals that it is a wool of this class, is now conclusive.*

While there is considerable evidence in behalf of the importer tending to show that the fleece on these sheepskins does not have the characteristics usually found in wool and is not ordinarily used for the purposes for which wool is used or adapted thereto, there is, on the other hand, material evidence in behalf of the Government that it does possess these qualities and is adapted, to a limited extent, to the uses of a low-grade wool.

Mr. Robert N. Kitching, who has been the examiner of wool fibers at the port of New York for about fifteen years and is practically familiar with all kinds of sheepskins imported and has frequently examined and passed upon Mocha sheepskins, and who was a witness for the importer (R., 25), testified with reference to the skin, Exhibit 1, which was a sample of the importations in question, as follows:

> Question. Referring to Exhibit 1 before you, how would you return that article for classification?
>
> Answer. I would return such as that as wool, sir.
>
> Question. Mocha sheepskin with the wool on?
>
> Answer. Yes, sir. (R., 26.)

He also testified that it could be carded, but that there would not be much left after carding it, and while he stated that it was not commercially suitable for carding, added "they can mix it with wool and card it." (R., 26.)

Ammon P. Souls, a dealer in hair and wool, a witness for the importer, who testified that he had handled car after car of this merchandise and sold it to stuffing manufacturers, also stated that it had been tried in mills to spin, but very little, and might be used sometimes by carpet manufacturers in a small way; also that while it could not be used or spun alone, it *could be carded and, as he thought, could be made into yarn.* (R., 16.)

Lazarus Simon, a wool dealer, a witness for the importer, after testifying that the substance on this skin was "hair," incidentally contradicted himself and referred to it as "wool," stating in reference to one lot that he had bought that he "took the *wool* off and sold it." (R., 23.)

George B. Ritchie, a wool and hair importer, and also a witness for the importer, being asked for what commercial purpose a growth like that on Exhibit 1 was suitable, stated, among other things, that "if it runs pretty white it is *sometimes used in these low carpet yarns*, where they put in such stuff as jute bagging is made of and some hair like this on Exhibit 1. The yarn itself sells for six and a half to seven cents a pound." (R., p. 37.)

It thus appears from the importer's own wit-

nesses that while this wool is of a low grade, largely mixed with hair, it is, nevertheless, in the opinion of the wool examiner, a wool of the third class; it can be carded; it is sometimes used, as shown by two witnesses, as a low-grade carpet yarn (this being the distinctive use of third-class wool); and it is admittedly the coat of a species of sheep and imported and sold in this country.

There is therefore certainly material evidence tending to show that it is in fact a low-grade wool of the third class, and it was therefore, independently of any other consideration, properly classified by the collector upon its qualities and uses alone, if such considerations were material.

Furthermore, as above seen, the principle upon which wools are classified under the statute is that of blood and breed.

It had been previously held by the Board of General Appraisers, in 1890, in Treas. Dec. No. 21737, that a cheap grade of mixed hair and wool, the product of a Mocha sheep of Arabian origin, used as a carpet-filling wool for making carpet yarns, was properly classified as wool of the third class, this decision, as stated in the present decision of the Board of General Appraisers, having been followed in an unpublished decision in 1900, under protest 41888–F, which was affirmed upon appeal, without opinion, by the United States Circuit Court for the southern district of New York, in 1904, in the case of *Abe Stein Company* v. *United States* (R., 28).

The importer concedes that this former decision, relating to the fleece of a Mocha sheep of the same general race or blood, is correct (R., 34).

In the present case it was held by the Board of General Appraisers that the question was the same as that involved in the former case, and that the evidence in the former case "that the article found on this class of skins, whether called hair or wool, could be carded," was "substantially confirmed by the testimony of Examiner Kitching" in the present case, and therefore, following the rule in the former cases and upon the authority of *Lyon* v. *Marine* (55 Fed., 964), the decision of the collector was affirmed (R., 28).

While it is true that this is a general finding, yet, under the doctrine of *Brainerd* v. *Buck* (184 U. S., 99, 105), it operated as a finding in favor of the Government upon every material fact, including the fact that the merchandise in question is wool of the third class.

While it is true that additional testimony was introduced by the importer in the Circuit Court for the purpose of differentiating the qualities of the fleece of the species Mocha sheep in the former case, which came from Jeddah, Arabia, from the white-head Mocha sheep involved in the present case, which came from Hodeida, Arabia, it is submitted that the weight attaching to the decision of the Board of General Appraisers is not entirely destroyed by the new evidence thus intro-

duced, and that when, after the consideration of such new evidence, both the Circuit Court and the Circuit Court of Appeals have concurred in their finding of fact that the merchandise in question is wool of the third class, this conclusion, in view of the material evidence by which it is supported, is now conclusive.

In the opinion rendered by the Circuit Court it was said:

> The sole question presented is whether these skins have wool on or hair only. The Board of General Appraisers reached the conclusion that a certain percentage of the covering was wool, and therefore that the skins were sheepskins with the wool on within the meaning of the tariff act. Inasmuch as there was sufficient evidence to support the finding of the Board as to the fact of wool upon the skins, and as the court, upon examination of the sample, is unable to say that this finding is incorrect, and as the definitions in the encyclopedias and dictionaries support the claim that such a product is wool, although of a low order, the decision of the Board of General Appraisers is affirmed. (R., 39.)

In the Circuit Court of Appeals the judgment below was affirmed on the opinion of the Circuit Court. (R., 46.)

The case therefore calls for the application of "the settled doctrine of this court * * * that the concurring decision of two courts on a question

of fact will be followed unless shown to be clearly erroneous."

*Dravo* v. *Fabel*, 132 U. S., 487.
*Compania La Flecha* v. *Brauer*, 168 U. S., 104.
*Stuart* v. *Hayden*, 169 U. S., 1.
*Baker* v. *Cummings*, 169 U. S., 189, 198.
*Wupperman* v. *The Carib Prince*, 170 U. S., 655.
*Workman* v. *New York City*, 179 U. S., 552, 555.
*Brainerd* v. *Buck*, 184 U. S., 99.
*Beyer* v. *Le Fevre*, 186 U. S., 114.
*Shappirio* v. *Goldberg*, 192 U. S., 232.

In *Beyer* v. *Le Fevre* (186 U. S., 114), Mr. Justice Brewer, delivering the opinion of the court, said that—

> It is well settled that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion and not attempt to weigh conflicting testimony. *Stuart* v. *Hayden* (169 U. S., 1, 14) and authorities cited in the opinion. And this rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts are found by a master or a jury. *Furrer* v. *Ferris* (145 U. S., 132) and cases cited in the opinion. These propositions we have often affirmed.

So, in the present case, this rule of concurrence with the conclusion of the trial and appellate courts

is given more weight by the fact that in the first instance the facts were likewise found by the Board of General Appraisers.

V.

For the foregoing reasons it is submitted that there is no error in the record and that the judgment of the Circuit Court of Appeals should be in all things affirmed.

Respectfully,

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